Supreme Court of the United States

October Term, 1973

No. 72-1318

ARTHUR KRAUSE, ADMINISTRATOR
of the Estate of Allison Krause, *et al.*,
Petitioners,

v.

JAMES RHODES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF IN SUPPORT OF PETITIONERS ON BEHALF OF THE NATIONAL BAR ASSOCIATION AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Bar Association respectfully moves, pursuant to Rule 42, for leave to file the attached brief amicus curiae on behalf of Petitioners. Oral consent of the Petitioners and all Respondents except Respondent James Rhodes has been granted. Respondent James Rhodes' consent has been denied.

The National Bar Association is a national organization of judges and lawyers. It has among its purposes, the sound and orderly administration of justice and the securing, for everyone, the free and untrammeled use of rights

guaranteed by the Constitution of the United States, including the right to due process of law and the equal protection of the laws. It believes that for every right there must be an available remedy; and to that end, open and equal access to the courts for fair, impartial determinations, and redress is essential.

The issues in the instant cases and the decision of this Court will have a substantial effect on pending and future cases where access to the courts is sought and, therefore, these cases are of vital concern to the National Bar Association. It is respectfully requested that this motion for leave to file an amicus brief be granted. Filed herewith is our brief as amicus curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE THE NATIONAL BAR ASSOCIATION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment IX:

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

2. United States Constitution, Amendment XI:

   "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ."

3. United States Constitution, Amendment XIV:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

4. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Ohio Constitution, Article I, Section 2:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary. . ."

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of the Amicus in this litigation is set forth in the Motion for Leave to File, bound together with this brief at page 1, *supra*.

The arguments of the Amicus in this brief support the position of Petitioners in this case.

STATEMENT OF CASE

Petitioner's statement of the case is hereby adopted.

SUMMARY OF ARGUMENT

The argument in Part 1 is summarized as follows: The doctrine of sovereign or governmental immunity is in violation of the due process of law and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The Eleventh Amendment barring suits in the federal courts by citizens against states, is modified by the Fourteenth Amendment so as to permit such suits where Fourteenth Amendment rights are violated.

The argument in Part 2 is summarized as follows: Neither the Eleventh Amendment nor judicial precedent bar suits in federal courts against state officials in their individual capacities for violations of Fourteenth Amendment or 42 U.S.C. § 1983 guaranteed rights.

ARGUMENT

I. Is the Eleventh Amendment Modified by the Fourteenth Amendment so as to Allow Suits in Federal Courts Against States and State Officials for Violations of Fourteenth Amendment Rights?

The doctrine of sovereign or governmental immunity had its roots in Roman Law and the English Common Law. It has, at sometime or other and in varying degrees been a part of the law of every state.

Total governmental immunity no longer exists at the state level because of the many legislative and/or judicial exceptions. The more recent trend has been its total rejection at the state level on the ground that it violates the Fourteenth Amendment.

Judge Day of the Eighth Circuit Court of Appeals of Ohio in speaking for the majority in *Krause v. State*, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), stated:

> "Governmental immunity is an anachronism. It represents a vestige of the ancient apothcosis of the state in the person of a king. That the king can do no wrong is a dubious concept in a nation whose very founding repudiated kings. Discussions of such immunity begin with the idea of protecting acts of state (something greater than the sum of its citizens) and finish by shielding the wrongful acts of men. A person claiming injury is unprotected in either case. If, in fact, a culpable injury has been done and goes unchastised by the law because of the doctrine of sovereign immunity, that doctrine protects injustice for no better reason than its source is the state. And the concept becomes this: 'the king can do wrong with impunity.' This is outlaw doctrine obviously incompatible with the rule of law. Moreover, the notion that government may irresponsibly maim or kill contravenes the most elemental notions of due process of law." 274 N.E.2d 321, 324-325.

* * * * *

"The operation of the doctrine of sovereign immunity results in different consequences for injured persons in at least two ways. Persons victimized by private tort feasors may be compensated for their damages. But so long as sovereign immunity is extant persons suffering damage through comparable fault on the part of the state may not recover unless the tortious action happens to be one within a specific exception to the immunity rule. Assuming a case within a specific exception, then two classes of persons injured by the state develop—those hurt in the course of the excepted activity and those not. Such circumstances raise the question whether such differences as those described mount arbitrary and unreasonable distinctions incompatible with the constitutional standard established by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." 274 N.E. 2d 321, 326-7.

* * * * *

"If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend upon a gossamer as frail as that supporting those distinctions on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification of a rational policy and a denial of equal protection is crossed. *This fatally offends the Constitution.*" 274 N.E.2d 321, 327. (Footnotes omitted)

The well reasoned opinion and the decision of the Court of Appeals overruling sovereign immunity in Ohio in *Krause v. State*, 274 N.E.2d 321 (1971), was specifically overruled and reversed by the Ohio Supreme Court, thus reaffirming sovereign immunity in Ohio, in *Krause v. State*, 31 Ohio St. 132, 285 N.E.2d 736 (1972). Justice

Lloyd O. Brown in part of his dissenting opinion in *Krause v. State, supra,* points out the unjustness of the doctrine:

> "However, it is my belief that Section 16, Article I, on its face and as applied by the state (in the absence of such consent), unconstitutionally discriminates against the victims of state acts of negligence, in violation of the equal protection provision of the United States Constitution. It infringes upon one of the most fundamental progenitors of due process of law, through which all other legal rights may be enforced —access to the courts unhindered by the need for the expressed consent of the party-defendant."

The California Supreme Court, in *Muskopf v. Corning Hospital District,* 359 P.2d 457 (1961) rejected governmental immunity, and Justice Traynor speaking for the court about governmental immunity at 359 P.2d 457, 458-9 stated:

> "From the beginning there has been misstatement, confusion and retraction. At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. (Footnote omitted.) How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' Borchard, *Governmental Responsibility in Tort,* 34 Yale L.H. 1,4."

Also see *Hargrove v. Town of Cocoa Beach,* 96 So. 2d 130 (1957).

The mystery deepens when it is realized that the United States was founded on the repudiation of the King.

Further, neither the Founding Fathers nor the people of Ohio made the United States or the State of Ohio the sovereign, but reserved sovereignty to themselves.

The reservations of Sovereignty in the People is contained in the Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed*, . . ." (Emphasis added)

The Constitution of the United States, Amendment IX:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others retained by the people.*"

and The Constitution of the State of Ohio (1851), Article I, Section 2:

> "*All political power is inherent in the people.* Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; . . ."

Though conceptually dubious, sovereign or governmental immunity has been a part of the American Common Law, and in some instances codified law, for two hundred (200) years. However, neither past longevity nor judicial precedent justify the continuation of a doctrine that is both outdated and unjust.

Chief Justice Burger in his dissent in *Bivins v. Six Unknown Federal Narcotic Agents,* 403 U.S. 388, 420 (1971), stated:

> "'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the

past.' Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897)."

The continuation of the doctrine of sovereign immunity seems to rest on the reasoning that, without it, suits against the state would become financially burdensome and state officials would be deterred in the unflinching performance of their duty. Neither of these reasons are justification today.

> "*Although the doctrine emanated from the idea that the sovereign is supreme, its main justification has been that to allow suits against states would be financially burdensome.* While this argument may have been entitled to considerable weight in the financially precarious period immediately following the Revolution, it hardly suffices to justify the doctrine in the present day. Given the availability of insurance and the ability of states to raise revenues, there is no reason to protect the state from the legitimate claims of its constituents. Indeed, there is every reason to make the state responsible for the torts of its officials both as a matter of reasonable risk allocation and of social justice. But the states' awareness of their responsibility has been far from uniform. While at least six states have gone so far as to provide compensation for the innocent victims of violent crime committed by private individuals, others still refuse to provide compensation for similar crimes committed by their own agents and officials. Ironically, at least one state has enacted such legislation while preserving the traditional view of sovereign immunity. It is exceedingly difficult to rationalize a decision to assume responsibility for injurious acts of criminals but to refuse responsibility for those same acts by officials of the state." (Footnotes omitted). Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N. CAROLINA L. REV. 549, 558-9 (1972).

Inasmuch as governments have been created for the protection of the rights of the people, it would seem that

they, above all, should be held responsible for the acts of their officials, agents or employees in violating the rights of the people. As stated by Justice Clark in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961):

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

It was early established in American Law that the protection of the laws was a basic right.

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

The doctrine of sovereign or governmental immunity denies equal protection of the laws and due process of law to those injured by the wrong-doings of the state. Obviously, such a denial by the state, in the absence of the Eleventh Amendment, would be an unconstitutional violation of the Fourteenth Amendment.

The Eleventh and Fourteenth Amendments were both passed in response to historically significant events. The Eleventh to protect the states from feared contract suits, such as *Chisholm v. Georgia*, 2 U.S. (2 Doll) (1793), which could result in substantial money judgments against a state; and the Fourteenth, some seventy-five years later, in response to the widespread violence against newly freed slaves and others in the south in violation of their federal rights, and the inability, unwillingness, and/or opposition of the states, state courts and state officials to protect these rights.

The Eleventh Amendment is in broad terms to the extent that it prohibits "any suit in law or equity" by a citizen against a state in a federal court. On the other hand, Section I of the Fourteenth Amendment is narrow

to the extent that it seeks to protect only basic federal rights from infringement by a state, and 42 U.S.C. § 1983 passed pursuant to Section V of the Fourteenth Amendment gives protection against individual infringements of basic federal rights.

The constitutional rights secured from infringement by the states, and/or individuals acting under color of state law, by virtue of the exact language of the Fourteenth Amendment and 42 U.S.C. § 1983, were intended to be protected by the Federal Government and enforced through the federal courts. *Mitchum v. Foster,* 92 S. Ct. 2151 (1972), *Monroe v. Pape,* 365 U.S. 171 (1961), *Zwickler v. Koota,* 389 U.S. 245 (1967).

With the Eleventh Amendment denying the federal courts the power to entertain any suits against the state and the Fourteenth Amendment creating federal rights against the state enforceable in federal courts; an obvious conflict occurs.

For the very reasons that brought about Section I of the Fourteenth Amendment (i.e., the inability, unwillingness, and/or opposition of the states, state courts, and state officials to protect federal rights), this conflict must be resolved in favor of the Fourteenth Amendment, so as to allow suits in federal courts against states, and state officials acting under color of law, in violation of Section I of the Fourteenth Amendment and 42 U.S.C. § 1983.

To do any less would be to deem Section I of the Fourteenth Amendment and 42 U.S.C. § 1983 to have created rights without corresponding remedies, and thus make a mockery of what is one of the most significant amendments to the Constitution of the United States with respect to individual rights.

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one

instrument, all of whose provisions are to be deemed of equal validity. It would indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutory provisions of the Fourteenth Amendment have been disregarded by state enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment." Justice Shiras in *Prout v. Starr*, 188 U.S. 537 543 (1903).

For these reasons, this Court should determine that the Fourteenth Amendment qualifies the Eleventh Amendment to the extent that it conflicts with the Fourteenth Amendment in preventing suits in the federal courts against states and state officials brought pursuant to Section I of the Fourteenth Amendment and/or Section I of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. § 1983, and order trial of the Respondents herein on the merits.

II. Is the Eleventh Amendment a Bar to a Damage Action Brought Against the Governor of Ohio, and Against Generals and Officers of the Ohio National Guard in Their Individual Capacities While Acting Under Color of State Law for the Intentional Deprivation of Constitutional Rights Under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983?

The majority opinion of the United States Sixth Circuit Court of Appeals in upholding the dismissal of these actions on the pleadings held as follows (Opinion of Judge Weick, Scheuer Appendix p. 20a):

> "We hold that the actions against the Governor, the Officers of the National Guard, and the President of Kent State University, are in substance and effect actions against the State of Ohio. Suits against the State are prohibited by the Eleventh Amendment . . ."

The Court of Appeals in arriving at its holding adopted and affirmed the theory of the District Court as follows (Opinion of Judge Weick, Scheuer Appendix, p. 4a):

> "The theory of the motions to dismiss was that these suits, although nominally against the Chief Executive and Officers of the State, in substance and effect were against the State of Ohio since they directly and vitally affected the rights and interest of the State in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public . . ."

Both the theory and holding of the majority below are in conflict with the Eleventh Amendment of the Constitution of the United States and with the prior holding of this Court.

Further, if the circuit court's majority opinion is adopted by this Court, such adaptation would effectively

deny any federal court remedy to a person seeking to vindicate his constitutional rights under Section I of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1871.

The Eleventh Amendment is essentially negative in that it restricts the Judicial power of the United States. The restriction is very specific, in preventing suits in law or equity in the federal courts by individuals against one of the several states. It contains no restriction or even mention of suits commenced or prosecuted against state officials or officers in their individual capacities.

The Amendment itself thus denies its extension to cover state officials.

The Fourteenth Amendment prohibits a state from depriving any person of due process of law or equal protection of the laws. Section One of the Civil Rights Act of April 20, 1971, 17 Stat. 13, 42 U.S.C. § 1983 creates a right of action against *every person* who under color of state law deprives another of his constitutional rights.

The *every person* referred to, has included all levels of state officials in their individual capacity; to wit: Governor and Militia General in *Sterling v. Constantin*, 287 U.S. 378 (1932); state and county officials and school boards in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); police officers in *Monroe v. Pape*, 365 U.S. 167 (1961); Attorney General in *Ex parte Young*, 209 U.S. 123 (1908), and many other state officials.

In *Ex parte Young, supra*, the contention was made that the suit against the Minnesota Attorney General was in essence a suit against the state and therefore barred by the Eleventh Amendment. In a decision which has been cited and followed consistently, this Court held that it was not a suit against the state and not barred by the Eleventh

Amendment; even though, the injunction granted and upheld against the Attorney General effectively enjoined the state from enforcing a state statute, as the Attorney General was the only state official authorized to enforce the statute. In its decision this Court stated:

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U.S. 123, 156-60.

It is thus seen that precedent denies the extension of the Eleventh Amendment to cover state officials.

The extension of the Eleventh Amendment prohibition to state officials would effectively nullify Section One of 42 U.S.C. § 1983. As stated by Judge Celebrezze in his dissent below (Dissenting Opinion of Judge Celebrezze, Scheuer Appendix, p. 32a):

> ". . . I find no authority to support such an extension of the Amendment, nor do I understand the majority's disregard for the Supreme Court's ruling in *Ex parte Young* 209 U.S. 123 (1908). Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. § 1983, with its requirement that defendants thereunder be shown to have acted under color of state law."

For these reasons, this Court should reject the unwarranted and unsupported extension of the Eleventh Amendment to cover the Respondents herein and order trial on the merits.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the United States Sixth Circuit Court of Appeals, and remand this case for trial on the merits.

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